

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

STATUTORY REVIEW OF THE SYSTEM FOR
REGULATING RATES AND CLASSES FOR
MARKET-DOMINANT PRODUCTS

Docket No. RM2017-3

**OPPOSITION OF THE UNITED STATES POSTAL SERVICE TO MOTIONS TO
MODIFY THE PROCEDURAL SCHEDULE**
(January 24, 2017)

On December 20, 2016, the Commission issued an advance notice of proposed rulemaking to initiate its review of the market-dominant regulatory system under 39 U.S.C. § 3622(d)(3).¹ In that order, the Commission (1) established the scope of its review, (2) proposed interpretations of various key statutory terms that bear on the review, and (3) “invite[d] comments from interested persons regarding the process and structure of the review, as well as whether the current system is achieving the objectives, taking into account the factors.”² The Commission included four specific prompts for comments, expressly seeking commenters’ initial thoughts on the proposed interpretive framework, whether the current system is achieving the objectives (in light of that framework or an alternative one proposed by the commenter), and if not, what modifications or alternative system the commenter believes would do so, based on the commenter’s assessment of whether the objectives are being achieved.³

The Commission expressly began the proceeding with an advance notice of

¹ Order No. 3673, Advance Notice of Proposed Rulemaking on the Statutory Review of the System for Regulating Rates and Classes for Market Dominant Products, PRC Docket No. RM2017-3 (Dec. 20, 2016).

² *Id.* at 10.

³ *Id.* at 10-11.

proposed rulemaking (ANPR), clearly suggesting that, if the Commission finds that the current system does not meet statutory criteria, there will be another opportunity for public comment after the Commission proposes a rule on any modification or alternative system. ANPRs are not designed to foreshadow the agency's thinking or prejudice outcomes; rather, they seek to flush out the public's views on a regulatory matter, so as to "enable[] the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated" – and particularly before even offering a concrete agency proposal for further public comment.⁴ The Commission has consistently used ANPRs in precisely that manner in past significant rulemakings.⁵ The Administrative Procedure Act expressly allows this practice, insofar as a "general notice of proposed rulemaking" (which arguably includes an ANPR) must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."⁶

⁴ Am. Iron & Steel Inst. v. EPA, 568 F.2d 284, 291 (3d Cir. 1977) (quoting *Texaco, Inc. v. Fed. Power Comm'n*, 412 F.2d 740, 744 (3d Cir. 1969)). For recent examples of other agencies' ANPRs, see, e.g., National Oceanic & Atmospheric Administration, Fisheries of the Northeastern United States; Jonah Crab Fishery; Advance Notice of Proposed Rulemaking and Notice of Intent To Prepare an Environmental Impact Statement; Scoping Process, 81 Fed. Reg. 70,658 (2016); Bureau of Land Management, Advance Notice of Proposed Rulemaking Regarding a Competitive Process for Leasing Public Lands for Solar and Wind Energy Development, 76 Fed. Reg. 81,906 (2011). It should be noted that both of these examples allowed only for a single round of public comments.

⁵ See generally Order No. 3624, Advance Notice of Proposed Rulemaking to Evaluate the Institutional Cost Contribution Requirement for Competitive Products, PRC Docket No. RM2017-1 (Nov. 22, 2016); Order No. 1309, Advance Notice of Proposed Rulemaking on Modern Rules of Procedure for Nature of Service Cases Under 39 U.S.C. § 3661, PRC Docket No. RM2012-4 (Apr. 10, 2012); Order No. 15, Second Advance Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking, PRC Docket No. RM2007-1 (May 17, 2007); Order No. 2, Advance Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking, PRC Docket No. RM2007-1 (Jan. 30, 2007).

⁶ 5 U.S.C. § 553(b)(3) (emphasis added); see *Natural Res. Def. Council, Inc. v. EPA*, 595 F. Supp. 1255, 1264 (S.D.N.Y. 1984) ("[T]he minimum of a 'proposed rule' under section 553(b) of the APA would appear to permit the ANPRs published by EPA. ANPRs include 'a description of the subjects and issues involved.' In addition, EPA's structuring of the rulemaking proceedings to resolve the difficult scientific issues presented is entitled to 'great deference.'" (citations omitted)).

Given the above, the Commission's approach in Order No. 3673 is well-grounded in administrative law and practice, including its own. Clearly, the Commission is well within its authority to seek out a full range of views on the issues at stake before issuing any proposed rule, on which interested parties will have an opportunity to comment. Indeed, proceeding in this manner will enhance the efficiency of the process at a time when the Postal Service needs an expeditious resolution of this matter.

Despite all this, two different groups of mailing-industry associations have filed motions complaining about the Commission's ANPR.⁷ Both motions seek a round of reply comments and a gag order on the presentation of modifications or alternatives until and unless the Commission makes a final determination that the current system is not achieving the objectives. For the sake of economy, the discussion below will focus on the first motion, but the same points apply to both motions.⁸

The Alliance of Nonprofit Media (ANM) and MPA—the Association of Magazine Media (MPA) attack Order No. 3673 as hypocritical for “depart[ing] from” the Commission's earlier disavowal of “prejudg[ing] the threshold issue,” merely because it “invites comments . . . not only on whether the current regulatory system is working

⁷ Motion of Alliance of Nonprofit Mailers and MPA—The Association of Magazine Media to Modify the Procedural Schedule, PRC Docket No. RM2017-3 (Jan. 17, 2017) [hereinafter “ANM-MPA Motion”]; Joint Motion for Modification of Procedural Framework, PRC Docket No. RM2017-3 (Jan. 18, 2017) [hereinafter “Joint Motion”]. The movants are the American Catalog Mailers Association, the American Forest & Paper Association, the Association for Postal Commerce, the Data & Marketing Association, the Envelope Manufacturers Association, the Greeting Card Association, IDEAlliance, the Major Mailers Association, the National Association of Presort Mailers, the National Newspaper Association, the National Postal Policy Council, the News Media Alliance, the Parcel Shippers Association, and the Saturation Mailers Coalition.

⁸ United Parcel Service (UPS) also weighed in to support the Joint Motion and signal its interest as a “competitive products stakeholder.” See *generally* Statement in Support of the Joint Motion for Modification of Procedural Framework, PRC Docket No. RM2017-3 (Jan. 19, 2017). UPS's statement contains no new arguments and is likewise addressed by the discussion below.

properly, but also on specific changes to the system.”⁹ Apart from a single description of Order No. 3673 in the first sentence, ANM and MPA give no hint of understanding that Order No. 3673 is an advance notice of proposed rulemaking designed – as ANPRs typically are – not to set forth or even outline any Commission conclusion, but to seek others’ initial views on a wide range of potential issues in this proceeding.¹⁰ Despite seeking commenters’ views on a conditional question (essentially, if you believe that the current system is failing, how would you propose to modify or alter it?), nowhere in Order No. 3673 does the Commission indicate any assumption of its own about whether the current system is working or failing, or any intent to bypass that question on its way to the conditional question of potential modification or replacement. ANM and MPA’s mistaken premise undermines their entire motion.

ANM and MPA go on to worry that commenters might waste resources addressing a conditional question that might prove moot, either because the Commission decides that the current system is working or because the Commission later asserts that it does not have the authority to adopt changes.¹¹ This argument is without merit. No commenter needs to commit any resources to the conditional question at this time. Order No. 3673 is an advance notice of proposed rulemaking, and there will clearly be another phase of public comment after the Commission issues any proposed rule regarding potential modification or replacement of the current system

⁹ ANM-MPA Motion at 2-3.

¹⁰ In this way, ANPRs can be analogized to the Commission’s public inquiry dockets, in which the Commission typically invites discussion of a given topic to inform its later determinations, without suggesting a view of its own that might prejudice that discussion.

¹¹ *Id.* at 3-4.

(and hence before the Commission adopts any final rule).¹² Indeed, far from burdening proponents of the current system, this initial ANPR phase gives them an advantage in that they will have more time to study the positions of those parties who propose changes.¹³

The Postal Service strongly supports the current approach because it is more conducive to a timely resolution of this proceeding. If the Commission concludes that the system is not achieving the objectives, both it and other parties will already have an understanding of where those parties who favor change stand when it comes to proposed changes to the system. This can only help to ensure that any future proceedings to consider potential modifications or alternatives will occur in an efficient fashion. This is critical, considering the Postal Service's precarious financial condition.¹⁴

Finally, ANM and MPA do not demonstrate that the Commission's decision not to allow reply comments at this stage is inappropriate. As noted above, opportunity for comment will surely be provided in this proceeding regarding any proposed modifications or alternatives to the system. Furthermore, interested parties already have, as a reference point, the Commission's past assessments of the current

¹² MPA and ANM state the obvious when they say that "the Commission may not adopt any of the proposals [for regulatory changes] submitted on March 20 without first soliciting comments on the proposals in a later stage of the case." *Id.* at 6. Nothing in the ANPR suggests that the Commission intends to do otherwise.

¹³ It should be emphasized again that, unlike a notice of proposed rulemaking, an ANPR is not obligatory under the Administrative Procedure Act; rather, it is a matter of the agency's discretion to allow an additional early round of public input.

¹⁴ Contrary to the views of ANM and MPA, the fact that the Postal Service has been able to continue operations by defaulting on statutorily mandated post-retirement benefits payments is no excuse for the Commission to slow down its conduct of this proceeding.

regulatory system's effectiveness (which, it should also be noted, the Commission felt equipped to undertake without any public input whatsoever).¹⁵ As for their ability to respond to other interested parties' positions on the current system, those positions are predictable, and so each commenter should be able to anticipate and respond to opposing positions in a single round of comments. For both of these reasons, a round of reply comments would bring only marginal benefit that would not outweigh the detriment to the efficient conduct of this proceeding.

Respectfully submitted,
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¹⁵ *E.g.*, Postal Regulatory Comm'n, Annual Report to the President and Congress, Fiscal Year 2012 (Jan. 3, 2013), at 15-36. By pointing to this example, the Postal Service does not concede that the Commission's analysis (on which interested persons were not allowed to comment) was necessarily correct or relevant in all respects. Rather, the point here is that the Commission and interested parties already have a reference point for how the Commission might evaluate the regulatory system, thereby reducing the arguable need for additional rounds of comment.